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July 14, 1992

BY HAND DELIVERY

Ms. Donna R. Searcy,
Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY


RE: PR Docket No. 92-80; RM 7909

Dear Ms. Searcy:

Transmitted herewith for filing in the above-referenced docket on behalf of The Board of Trustees of Leland Stanford Junior University are an original and five copies of its "Reply Comments On Notice Of Proposed Rule Making."

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,


William D. Wallace
(Member of Florida Bar only)

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 14 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Parts 1, 2, and)
21 of the Commission's Rules)
Governing the Use of)
Frequencies in the 2.1 and)
2.5 GHz Bands)
)

PR Docket No. 92-80
RM 7909

To: The Commission

REPLY COMMENTS ON NOTICE OF PROPOSED RULE MAKING

Pursuant to Section 1.415 of the Commission's Rules, The Board of Trustees of Leland Stanford Junior University ("Stanford"), by its attorneys, submits these reply comments in the above-referenced docket in response to comments submitted on the Notice of Proposed Rule Making ("Notice"), FCC 92-173, released May 8, 1992.

Stanford has been licensed to operate an ITFS system on Station KGG-38 (E-Channel Group) in the San Francisco Bay Area since 1969. The Stanford Instructional Television Network transmits over 250 courses per year in various subject areas, including, for example, engineering, computer science, math, applied physics and statistics, to approximately 3500 students enrolled in the University. In addition, approximately 3500 students receive instructional programming on a not-for-credit basis.

In its Notice, the Commission proposes elimination of long-standing rules requiring MDS applicants to protect existing co-channel and adjacent channel ITFS licensees from harmful interference. Adoption of such a regime would severely prejudice Stanford's ongoing operations.

The Commission has received comments from MDS operators noting that the current interference protection procedures are not "overly burdensome," Comments of Kingswood Associates, at 9, and that the proposed procedures are "unnecessary and burdensome," Comments of Consortium of Concerned Wireless Cable Operators, at 17. As these commenters recognize, the Commission's current rules allow ITFS operators to review predicted interference from MDS applicants, and to attempt to resolve any problems which may arise. Under the new rules, no interference study would be provided and there would be insufficient time allowed for an ITFS operator to review actual interference at its receive sites. See Comments of Roman Catholic Communications Corporation of the Bay Area, at 8.

As a grandfathered facility on the E-Channel Group, Stanford also notes that the proposed changes are directly contrary to the Commission's commitment to grandfather and protect ITFS stations on the E- and F-Channel Groups "in perpetuity." Instructional TV Fixed Service (MDS Reallocation), 94 FCC 2d 1203, 1247 (1983).

Moreover, the Commission has proposed the new rules to help process its backlog of MDS applications, some of which were received during 1980 and 1983 filing periods. Notice, ¶ 5. Apparently, the Commission is proposing to adopt new rules which

eliminate interference analyses required under current rules and apply them retroactively to these previously-filed MDS applications. Stanford objects to such retroactive application of any new rules which may be adopted.

Retroactive application of new MDS rules would not comport with judicial precedent, as well as imposing an additional burden on existing ITFS facilities. It is well settled that retroactive rulemaking is not favored in the law. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (invalidating the retroactive imposition of Medicare cost-limit rules). Even a statutory grant of rulemaking authority will not permit retroactive rulemaking unless Congress expressly authorizes such action. Id. The Supreme Court has interpreted the Administrative Procedure Act definition of "rule" to limit the effects of rulemaking only to the future: "a rule is a statement that has legal consequences only for the future." Id. at 217 (Scalia, J., concurring).

In dealing with MDS applicants within the Bay Area, Stanford has relied upon the Commission's policies to protect co-channel and adjacent channel ITFS stations from harmful interference caused by new MDS stations. One aspect of these policies has been the requirement that MDS applicants provide to existing ITFS stations an interference analysis, which demonstrates that the proposed MDS facility would not cause harmful interference to the ITFS station. See current 47 C.F.R. § 21.902(i).

Receipt of this analysis of predicted interference from existing MDS applicants has allowed Stanford to gauge the

potential harm which the MDS applicant would cause at each receive site, and, if necessary, evaluate engineering methods to assuage such harm. The procedures currently in place have provided critical protection to Stanford, and allowed it continue to transmit much-needed instructional programming to many receive sites.

If the Commission were to apply its proposed new rules to pending applicants, they would apparently not be required to provide any interference analysis to Stanford. They would simply construct their systems and turn them on. Such a procedure would severely impair the ability of Stanford to continue to operate its current facilities, and would deny or severely impede 3500 students from completing their educational requirements.

With respect to existing MDS applicants, the new rules would nullify long-standing negotiations, and place the parties back in the starting blocks with the advantage to the MDS applicant. If the Commission were to apply these proposed rules retroactively, Stanford would lose important rights to protection which it has under the existing rules, and large amounts of employee time and money for engineering analyses would be wasted. Moreover, Stanford and existing applicants would be required to start new negotiations if actual interference were to occur, imposing significant administrative and financial burdens.

The proposed rules eliminating interference protection standards would severely impair the ability of Stanford to deliver much-needed instructional programming. Moreover, retroactive

application of the Commission's proposed new rules is contrary to legal precedent and would substantially prejudice Stanford.

Accordingly, Stanford urges the Commission to reject its proposal to eliminate MDS interference analyses and protection for ITFS stations, and, if it were to adopt such rules, to apply them prospectively only.

Respectfully submitted,

THE BOARD OF TRUSTEES OF LELAND
STANFORD JUNIOR UNIVERSITY

By: Linda K. Smith (widow)
Linda K. Smith
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Dated: July 14, 1992

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of July 1992, I have caused to be served a copy of the foregoing "Reply Comments on Notice of Proposed Rule Making" by hand delivery (indicated by *), or first class mail, postage prepaid, on the following:

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